

UNITED STATES COURT OF APPEALS

NOV 10 2004

TENTH CIRCUIT

PATRICK FISHER
Clerk

JOHN CHARLES GAUTHIER,

Petitioner - Appellant,

v.

STATE OF OKLAHOMA and JESSE
T. SUTTER, JR., Warden,

Respondents - Appellees.

No. 04-5082

(D.C. No. 04-CV-387-EA(J))

(N.D. Okla.)

ORDER

Before **EBEL, MURPHY** and **McCONNELL**, Circuit Judges.

The petition for rehearing filed in this court on November 3, 2004, is GRANTED. Our previous order in this case, filed on October 22, 2004, is VACATED. We AFFIRM the district court's denial of a certificate of appealability to the petitioner because the petitioner has failed to exhaust his state remedies. It now appears that the petitioner is in the process of exhausting his state remedies in the Oklahoma state courts. Thus, the dismissal of his habeas

petition is WITHOUT PREJUDICE.

ENTERED FOR THE COURT

David M. Ebel
Circuit Judge